

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

DEC 20 2017

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

CHRISTINA LOPEZ-BURTON, an
individual, on behalf of herself and all others
similarly situated,

Petitioner and Plaintiff,

v.

TOWN OF APPLE VALLEY, a general law
city; and DOES 1-10,

Respondents and Defendants.

Case No.: CIVDS1725027

VERIFIED PETITION FOR WRIT OF
MANDATE; AND

COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF AND REFUND
OF ILLEGAL FEES AND CHARGES

[CLASS ACTION]

Petitioner and Plaintiff Christina Lopez-Burton ("Petitioner" or "Plaintiff") on behalf of
herself and all others similarly situated, alleges the following, upon information and belief:

INTRODUCTION

1. Proposition 218, the *Right to Vote on Taxes Act*, was passed by the people of
California in November 1996. The measure stated its purpose "was intended to provide effective

BY FAX

1 tax relief and to require voter approval of tax increases. However, local governments have subjected
2 taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes
3 of voter approval for tax increases, but also threaten the economic security of all Californians and
4 the California economy itself. This measure protects taxpayers by limiting the methods by which
5 local governments exact revenue from taxpayers without their consent.” In 2010, voters passed
6 Proposition 26, which expanded the definition of what constitutes a “tax” and shifted the burden to the
7 government to prove that charges are not taxes. (See Cal. Const., art. XIII C, § 1, subd. (e).)

8 2. Petitioner brings this action, on behalf of herself and all others similarly situated, to
9 compel Respondent / Defendant Town of Apple Valley (“Respondent,” “Defendant,” or “Town”)
10 to comply with its obligations under Propositions 218 and 26 (Cal. Const., art. XIII C, § 1 subd. (e)
11 and § 2 subd. (b); Cal. Const., art. XIII D, § 6, subd. (b)(1)(2) and (5)). Specifically, the Town
12 unconstitutionally imposes solid waste (trash) collection fees and charges through rates¹ that exceed
13 the cost of providing such service, are used for a purpose other than that for which they are imposed,
14 and are used to fund general governmental services. The fees and charges include an alleged
15 “franchise fee” of 18% that represents neither a cost of trash collection service nor the value of any
16 property interests transferred. The fees and charges also fund transfers to the Town’s General Fund
17 for expenditures that are unrelated to the provision of trash collection services. Petitioner seeks (a)
18 a writ of mandate and/or judicial declaration that orders the Town to comply with its constitutional
19 duties, (b) an order restoring the illegal funds to the Town’s Waste Fund, and (c) a class-wide
20 refund for all trash collection customers.

21 PARTIES

22 A. Petitioner/Plaintiff

23 3. Petitioner and Plaintiff Christina Lopez-Burton has been a resident of the Town of
24 Apple Valley for approximately 14 years and has been paying the solid waste collection fees and
25 charges at issues herein since that time.
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¹ The terms “fees,” “charges,” and “rates” are used interchangeably herein.

1 **B. Respondents/Defendants**

2 4. Respondent Town of Apple Valley is a municipal corporation and general law city
3 located in the County of San Bernardino, California. It is an "agency" subject to Proposition 218.
4 (See Cal. Const. art. XIII C, § 1, subd. (b) & (c); art. XIII D, § 2, subd. (a).)

5 5. Petitioner is unaware of the true names and capacities of Respondents/Defendants
6 sued as DOES 1 through 10, and therefore sues them by such fictitious names. Petitioner is
7 informed and believes and thereon alleges, that each DOE Respondent/Defendant is responsible for
8 the acts, violations and injuries alleged herein. Petitioner will amend this petition and complaint to
9 allege the true names and capacities of the DOE Respondents/Defendants when their identities are
10 ascertained.

11 6. Petitioner is informed and believes and thereon alleges, that at all times, each of
12 DOE Respondents/Defendants the agent, employee, representative, partner, joint venturer, and/or
13 alter ego of each other Respondent/Defendant and, in doing the things alleged herein, was acting
14 within the course and scope of such agency, employment and representation on behalf of such
15 partnership or joint venture, and/or as such alter ego, with the authority, permission, consent, and/or
16 ratification of each other Respondent/Defendant.

17 **GOVERNMENT CLAIM**

18 7. On July 24, 2017, in accordance with California Government Code section 910, *et*.
19 *seq.* and *City of San Jose v. Superior Court* (1974) 12 Cal.3d. 447, Petitioner served the Town by
20 certified and first class mail, a written claim for money and damages on behalf of herself and all
21 others similarly situated, based on the claims raised herein. On October 13, 2017, Petitioner
22 served the Town by first class mail, a supplemental claim for money and damages on behalf of
23 herself and all others similarly situated, based on the claims raised herein. The Town did not
24 respond to either claim within 45 days and thus, they have been deemed rejected by operation of
25 law.
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GENERAL ALLEGATIONS

8. The Town provides trash collection service for its citizens ("customers"). The collection services are performed by a private company Burrtec Waste Industries, Inc. dba AVCO Disposal, Inc. ("Burrtec") pursuant to an Exclusive Franchise Agreement dated July 8, 2014 ("EFA"). The EFA fixes the rates that the Town agrees to pay Burrtec each month. Rates are based on the customer type (residential v. commercial), the size of the waste containers, and the frequency of the collections, *inter alia*. All collection and disposal of all solid waste is provided by the Town, whether directly or through its franchisee (Burrtec here) pursuant to Apple Valley Municipal Code sections 6.20.020 and 6.20.025. The Town's trash collection service is a property-related service because it is a public service having a direct relationship to property ownership. (See Cal. Const., art. XIII D, § 2, subd. (h).) The Town imposes trash collection fees and charges on properties as an incident of property ownership, including Petitioner's property. (*Id.*, § 2 subd. (e).) The fees and charges are for a property related service. (*Id.*) Indeed, under Apple Valley Municipal Code section 6.20.090: "The property owner or owners of record of any place or premises within the Town, where any solid waste or recyclables accumulates shall pay ... a fee in such amounts and in such manner as shall be established or required by the Town Council.... Any account set up and maintained for the collection of solid waste and recyclables collection fees contemplated by this Chapter shall be in the name of the property owner or owners of record only, and the property owner or owners of record shall be solely responsible for payment of the fees established."

9. Although Burrtec is responsible for collecting the trash, the Town is responsible for billing and administrative services under the EFA. In fulfillment of those responsibilities, the Town retains a third party, American Computer Services, Inc. ("ACS"), to bill customers. The amounts the Town bills (through ACS) exceed the rates due to Burrtec under the EFA. In other words, when the Town remits payments to Burrtec, the payments are smaller than the amounts charged to and collected from the customers. For example, the EFA requires the Town to pay Burrtec \$13.69 per month for each residential 40 gallon container serviced. But the Town charges its customers \$23.71 per month for such service.

1 10. The difference between the amount imposed by the Town upon its customers and
2 the amounts due to Burrtec under the EFA amounts is in the millions of dollars per year. The Town
3 uses some of the excess to fund costs necessary for the provision of trash collection services, like
4 a county waste fee and ACS's fees. But much of the excess is used to fund "costs" unrelated to the
5 provision of trash collection service.

6 11. For example, in Fiscal Year 2016-2017, the City transferred \$2,076,309 from its
7 Solid Waste Fund (where trash collection fees and charges are deposited and accounted for) to its
8 General Fund pursuant to a Cost Allocation Plan described in its budget. Of that amount, \$729,366
9 was allocated to pay costs incurred in the Town's budget for "General Gov't Services" (Account
10 1001-1200). But a substantial part of the General Gov't Service Account 1001-1200 funds services
11 totally unrelated to waste collection services, like services related to the Town's golf course and
12 park and recreation department.

13 12. The excess also reflects a substantial alleged "franchise fee" that the Town pays
14 itself. Section 5 of the EFA provides as follows:

15 CONSIDERATION – FRANCHISE FEE

16 a. Franchise Fee. In consideration of this Agreement and the permit and franchise
17 given CONTRACTOR under this Agreement, the TOWN shall receive as an
18 administration and franchise fee a sum equal to eighteen percent (18%) of all sums
19 collected by TOWN on behalf of the CONTRACTOR . . . TOWN may adjust the
20 Franchise Fee from time to time, provided that if TOWN increases the Franchise
21 Fee, CONTRACTOR may increase its rates by the amount necessary to pass through
22 the increase in the Franchise Fees.

23 13. Thus, embedded in the trash collection rates imposed by the Town upon its customers
24 is an additional 18% which totals approximately \$2 million per year. Those so-called "franchise
25 fees" are transferred from the Solid Waste Fund to the Town's General Fund and are used for
26 general governmental purposes.

27 14. A valid franchise fee is one a government entity charges a private utility in exchange
28 for franchise rights. A valid franchise fee paid by a private utility to a local government is a proper
cost that may be legally passed onto ratepayers through fees and charges. But to be valid, a

1 franchise fee must bear a reasonable relationship to the value of the franchise or property interests
2 conveyed. (See *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 876.)

3 15. The 18% franchise fee is not an actual cost of providing service, but rather an artifice
4 designed to generate surplus revenue for the Town. This is because the *Town* imposes such amounts
5 directly on its customers and Burrtec has no legal or practical obligation to pay such; the Town
6 simply remits payments to Burrtec based on a rate schedule in the EFA. But even if *some* franchise
7 fee was appropriate as a cost of providing service, the 18% fee is not valid because the Town and
8 Burrtec did not negotiate it as a reflection of the value of franchise or the property rights conveyed.
9 And the 18% franchise fee does not in fact reflect the value of the franchise or the property rights
10 conveyed. Prior to the execution of the EFA, the Town and Burrtec had executed an exclusive
11 franchise agreement dated July 1, 2012, which included a 6% franchise fee. Sometime in the first
12 half of 2014, the Town began exploring additional ways to bolster its General Fund revenues and
13 determined that it would seek to increase the franchise fee to 18%. Burrtec made no attempt to
14 negotiate against this increase because it understood that it would not be affected by it.

15 16. Burrtec has been providing waste collection services for the Town since at least 1989.
16 The EFA is nearly identical to the July 1, 2012 franchise agreement including the amounts the
17 Town pays to Burrtec for the collection services it provides. The only differences between the prior
18 agreement and the EFA are (a) the extension of the term of the EFA from July 31, 2017 to July 31,
19 2019, (b) the increase in the franchise fee from 6% to 18%, and (c) the inclusion of the Town's
20 animal shelter in the list of facilities to be serviced by Burrtec at no charge. Thus, the Town's
21 primary purpose for entering into the EFA was to triple the franchise fees for its sole benefit.

22 17. In mid-2014, the Town mailed to its customers a "Proposition 218" notice that
23 advised customers of a proposed trash collection rate increase. It stated that Burrtec had "provided
24 the Town of Apple Valley with rate projection information based on their annual rate review" and
25 that "the net increase to the Town of Apple Valley customers only includes the actual amount of
26 the contract increase received from Burrtec . . . and the landfill rate from the County of San
27 Bernardino." This language failed to mention that (a) the Town, not Burrtec, was the sole
28 beneficiary of this rate increase and (b) the rate increase was due in large part to the tripling of the
franchise fee from 6% to 18%. In fact, the notice failed to mention the tripling of the franchise fee

1 at all. Had the 18% franchise fee been the product of an arms-length negotiation and reflected the
2 actual value of the franchise rights granted to Burrtec, the Town presumably would have referenced
3 it in the notice. Its decision to conceal the 18% franchise fee from its customers is telling.

4 18. The Town approved the rate increases through the adoption of Resolution No. 2014-
5 33, dated August 12, 2014. Upon information and belief, the trash collection fees and charges
6 have not been modified or changed since that time.

7 19. The Town imposes solid waste collection fees and charges that exceed the amount
8 required to provide trash collection service. The solid waste collection fees and charges are used
9 for purposes other than that for which the fee or charge was imposed. The solid waste collection
10 fees and charges are imposed to fund general governmental services where the service is available
11 to the public at large in substantially the same manner as it is to the property owners.

12 CLASS ACTION ALLEGATIONS

13 20. Petitioner brings this class action pursuant to California Code of Civil Procedure
14 section 382 on her own behalf and on behalf of:

15 All trash collection customers of the Town of Apple Valley whom
16 the Town billed for trash collection service during the Class Period,
17 but excluding (a) persons who make a timely election to be
excluded from the proposed Class, and (b) the judge(s) to whom
this case is assigned and any immediate family members thereof.

18 21. The "Class Period" is from July 24, 2016 through to the date of judgment. Petitioner
19 reserves the right to redefine the Class prior to certification.

20 22. This action is properly maintainable as a class action.

21 23. The Class for whose benefit this action is brought is so numerous that joinder of all
22 Class members is impracticable. While Petitioner does not presently know the exact number of
23 Class members, the Town provides trash collection service to thousands of customers. Class
24 members can be determined and identified through the Town's records and, if necessary, other
25 appropriate discovery.

26 24. There are questions of law and fact that are common to Class members and which
27 predominate over any questions affecting only individual members of the Class. A class action will
28 generate common answers to the below questions, which are apt to drive the resolution of the

litigation:

- a. Whether the franchise fee imposed by the Town is an actual cost of providing trash collection services;
- b. Whether the 18% franchise fee is valid;
- c. Whether the 18% franchise fee is an illegal tax;
- d. The appropriate amount of the franchise fee, if any;
- e. Whether trash collection fees are being used to fund general governmental services;
- f. Whether the Town's actions violate article XIII D, section 6, subdivision b(1)(2) and (5) of the California Constitution;
- g. Whether Petitioner and other Class members have been damaged by the Town's actions or conduct;
- h. The proper measure of damages; and
- i. Whether Petitioner and other Class members are entitled to injunctive relief.

25. Petitioner is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. Petitioner's claims are typical of the claims of other Class members and Petitioner has the same interests as other Class members. Petitioner has no interests that are antagonistic to, or in conflict with, the interests of the other members of the Class. Petitioner is an adequate representative of the Class and will fairly and adequately protect the interests of the Class.

26. The prosecution of separate actions by individual Class members could create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which could establish incompatible standards of conduct for the Town or adjudications with respect to individual members of the Class that would, as a practical matter, be dispositive of the interests of the members of the Class not parties to the adjudications.

27. Furthermore, as the damages suffered by some of the individual Class members may be relatively small, the expense and burden of individual litigation makes it impracticable for the

1 individual members of the Class to redress the wrongs done to them individually. If a class action
2 is not permitted, Class members will continue to suffer and the Town's misconduct will continue
3 without proper remedy.

4 28. The Town has acted and refused to act on grounds generally applicable to the entire
5 Class, thereby making relief appropriate with respect to the Class as a whole.

6 29. Petitioner anticipates no unusual difficulties in the management of this litigation as
7 a class action.

8 30. For the above reasons, a class action is superior to other available methods for the
9 fair and efficient adjudication of this action.

10 **CAUSES OF ACTION**

11 **FIRST CAUSE OF ACTION**

12 **Petition for Writ of Mandate**

13 **C.C.P. § 1085**

14 **(Against All Respondents)**

15 31. Petitioner hereby incorporates by reference each of the preceding allegations as
16 though fully set forth herein.

17 32. Respondents imposed, extended, and increased, and continue to impose, trash
18 collection fees and charges in a manner that violates California Constitution, article XIII D, section
19 6, subdivision (b)(1)(2) and (5.) Alternatively, Respondents have imposed, extended and increased,
20 and continue to impose, taxes in the form of trash collection fees and charges that exceed the
21 reasonable cost to Respondents of providing trash collection services and such fees and charges
22 were not approved by a majority of voters voting in an election on the issue of the imposition in
23 violation of California Constitution, article XIII C, section 1 subdivision (e) and section 2
24 subdivision (b). Respondents have refused and continue to refuse to comply with such
constitutional duties.

25 33. There is a clear, present and ministerial duty on the part of the Respondents to
26 comply with these constitutional duties. Petitioner has a clear, present and beneficial right to the
27 performance of those duties.

28 34. Petitioner does not have an adequate remedy at law.

1 35. Accordingly, Petitioner and the Class are entitled to a writ of mandate pursuant to
2 Code of Civil Procedure section 1085 so as to ensure compliance with the law.

3 **SECOND CAUSE OF ACTION**

4 **Declaratory Relief**

5 **C.C.P. § 1060**

6 **(Against All Defendants)**

7 36. Plaintiff hereby incorporates by reference each of the preceding allegations as
8 though fully set forth herein.

9 37. An actual, present, and substantial controversy exists between Plaintiff and the
10 Class, on the one hand, and Defendants, on the other. Plaintiff contends that Defendants have
11 violated and/or will continue to violate California Constitution article XIII D section 6 subdivisions
12 (b)(1)(2) and (5) or alternatively, California Constitution, article XIII C, section 1 subdivision (e)
13 and section 2 subdivision (b). Defendants contend that they have complied, and will continue to
14 comply with said constitutional restrictions and requirements.

15 38. Plaintiff and the Class are entitled to a judicial declaration declaring that the fees
16 and charges the Defendants impose violated or are in violation California Constitution article XIII
17 D section 6 subdivision (b)(1)(2) and (5) or alternatively, California Constitution, article XIII C,
18 section 1 subdivision (e) and section 2 subdivision (b) and an order compelling Defendants to
19 restore or refund all illegally-imposed fees and charges.

20 **THIRD CAUSE OF ACTION**

21 **Injunction Pursuant to C.C.P. § 526a**

22 **(Against All Defendants)**

23 39. Plaintiff hereby incorporates by reference each of the preceding allegations as
24 though fully set forth herein.

25 40. Plaintiff, on behalf of herself and the Class, is entitled to, and seeks, an injunction
26 pursuant to Code of Civil Procedure section 526a to enjoin Defendants from their illegal
27 expenditure and waste of funds – to wit, Defendants' transfer of solid waste collection fees to the
28 Town's General Fund.

FOURTH CAUSE OF ACTION
Refund - Violation of Cal. Const. art. XIII D, Section 6
(Against All Defendants)

41. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

42. Defendants have violated California Constitution, article XIII D, section 6 subdivisions (b)(1)(2) and (5) or alternatively, California Constitution, article XIII C, section 1 subdivision (e) and section 2 subdivision (b).

43. Plaintiffs and the Class have been damaged by Defendants' violations and are entitled to recovery in the form of a refund, plus interest thereon.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff/Petitioner, individually and on behalf of all others similarly situated, hereby prays that the Court determine that this action may be maintained as a class action and further prays that the Court enter judgment in her favor and against the Respondents/Defendants, as follows:

1. An order certifying the proposed Class, designating Petitioner as the named representatives of the Class, and designating the undersigned as Class Counsel;
2. A refund to Petitioner and the Class for all monies illegally collected in an amount to be proven at trial;
3. Injunctive relief;
4. An award of attorneys' fees and costs, as allowed by law, including, but not limited to, under California Code of Civil Procedure section 1021.5;
5. An award of pre-judgment and post-judgment interest, as provided by law;
6. For the issuance of a writ of mandate directing Respondents/Defendants to stop the imposition of the illegal fees and charges;
7. For a judicial declaration of the rights and obligations of the parties, to guide the parties' future conduct; and
8. For such other, further, and different relief as the Court deems proper under the circumstances.

1 Dated: December 14, 2017
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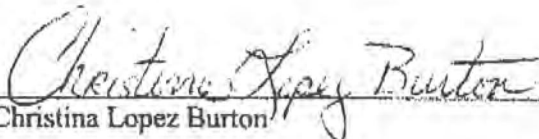
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VERIFICATION

I, Christina Lopez Burton, have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE; AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND REFUND OF ILLEGAL FEES AND CHARGES and know the contents thereof. The matters stated therein are true and correct of my own knowledge and belief or on information and belief as indicated therein.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed in the County of San Bernardino, California.

DATED: 12-14-17


Christina Lopez Burton